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Supreme Court, U.S.

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JOSEPH F. SPANIOLO, JR.  
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Case No. 87-522 552

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IN THE SUPREME COURT OF  
THE UNITED STATES

October Term, 1987

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JOHN H. LARY, JR.,  
Petitioner,

v.

MANSOUR ANSARI AND  
MANSOUR ANSARI ORIENTAL RUGS, INC.,  
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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PETITIONER'S REPLY BRIEF

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John H. Lary, Jr., Petitioner  
600 St. Clair Street S.W.  
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205/533-1510

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## TABLE OF AUTHORITIES

### **cases:**

<u>L.A. Durbin, Inc. v. Jefferson Nat'l Bank</u> , 793 F.2d 1541 (11 Cir. 1986).	1
<u>United States v. Boyle</u> , 157 App DC 166, 482 F.2d 755, cert denied 414 U.S. 1076, 94 S.Ct. 593.	1
<u>United States v. Williams</u> , 341 U.S. 70, 71 S.Ct. 581	1
<u>Woodman v. United States</u> , 30 F.2d 482 (1929 CA5 Tex), cert denied 279 U.S. 855, 49 S.Ct. 351	1

## REASONS THE PETITION SHOULD BE GRANTED

Ansari is indeed correct that res judicata precludes relitigation of an issue that was or could have been litigated in prior action. I. A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541 (11 Cir. 1986). Even assuming the absence of overriding public policy considerations sufficient to avoid that preclusion, what Ansari and the Eleventh Circuit have still failed to show, however, is how Lary could possibly have litigated his conspiracy claim against Ansari at a time when, due to Ansari's untruthful answers at deposition, the very existence of the conspiracy was unknown. Is there now a new maxim of law that allows parties to profit from fraudulent misconduct during discovery? And, since conspiracy is a different crime from the underlying offenses, Lary's conspiracy claim against Ansari is a different cause of action from his earlier common law fraud claim, even though these two causes of action share some common elements. "The commission of a substantive offense and conspiracy to commit it are separate and distinct crimes," United States v. Boyle, 157 App DC 166, 482 F.2d 755, cert denied 414 U.S. 1076, 94 S.Ct. 593. "Ordinarily, acquittal of a particular crime does not, on principle of res judicata, operate as bar to prosecution for conspiracy to commit the crime," Woodman v. United States, 30 F.2d 482 (1929 CAS Tex), cert denied 279 U.S. 855, 49 S.Ct. 351. "Acquittal of particular crime does not, on theory of former acquittal or jeopardy, bar subsequent prosecution for conspiracy to commit crime," United States v. Williams, 341 U.S. 70, 71 S.Ct. 581.

Lary's present common law fraud claim against Ansari now contains the indispensable element of Ansari's 1986 breach of the Termination Agreement (this element is indispensable because Ansari won prior lawsuit by raising defense of the covenant not to sue contained in the Termination Agreement, a defense that is no longer available to him because of his 1986 breach). Accordingly, present common law fraud claim is a different cause of action than earlier common law fraud claim. Ansari's 1986 breach of the Termination Agreement certainly was not litigated during the 1984 trial. Nor could it have possibly been litigated then; at that time

Ansari's breach had not yet occurred.

Lary agrees that he cannot relitigate his 1984 common law fraud claim against Ansari or, absent overriding judicial considerations, any other claim that he could have litigated during 1984 trial. But his new common law fraud claim now includes as indispensable element an event that occurred after conclusion of prior action. And his R.I.C.O. conspiracy claim was not litigated and could not have been litigated during trial of prior action. Accordingly, the fourth test for the imposition of res judicata preclusion, the requirement that the "same cause of action must be involved in both cases" is not met for either Lary's conspiracy causes of action or his new common law fraud cause of action here. That fourth element may preclude by res judicata Lary's non-conspiratorial R.I.C.O. claim on grounds that it could have been litigated during prior action, but Lary argues that overriding public policy considerations should allow him to pursue this cause of action as well. (i.e., res judicata may arguably bar Lary's non-conspiratorial R.I.C.O. claim, unless Court decides that public policy considerations are sufficiently strong so as to override bar and allow that claim to go forward, but res judicata cannot properly bar either Lary's R.I.C.O. conspiracy claim or his new common law fraud claim, since neither of these two claims were litigated or could have possibly been litigated in prior lawsuit.)

## CONCLUSION

Because the Court of Appeals, among other errors, decided an important question of Federal law (erroneously held that R.I.C.O. conspiracy cause of action is same cause of action as underlying common law fraud claim) wrongly and in conflict with decisions of United States Supreme Court and decisions of other Circuits, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I certify that I have, this \_\_\_\_ day of November, 1987, served three copies of the foregoing upon Stephen E. O'Day, counsel for the Respondent, by United States Mail, postage prepaid, as follows:

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John H. Lary, Jr.

